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No. 07-373

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PAUL C. RAY, ESQ.
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Blvd. South
Las Vegas, NV 89101
(702) 382-4044

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether federal aviation law precludes States from requiring airport operators to pay compensation when airspace usable for private development is appropriated for public transit use.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Vacation Village, Inc., and CEH Properties, Ltd., state that neither respondent has a parent corporation, and that no publicly held company owns 10% or more of either respondent's stock.

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CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Airports regularly use their power of eminent domain to acquire land and airspace needed for expansion. The sole question presented by the petition is whether federal aviation law precludes the State of Nevada from requiring Nevada airport operators to pay compensation when airspace usable for private development is appropriated for public transit use. Last Term, this Court denied a petition presenting precisely the same question, authored by the same counsel, on behalf of the same petitioner.

See *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (cert. denied Feb. 20, 2007). Nothing warrants a different result here. Petitioner Clark County admits that there is no split of authority; both the Nevada Supreme Court and the Ninth Circuit now agree that the County's claim lacks merit. And unlike the case at issue in the prior petition, this case is a wholly inadequate vehicle for review of the question presented. While the parties in *Sisolak* agreed that the question was properly before the Court, here petitioner pressed *five* separate jurisdictional challenges below, all of which this Court would have to address before reaching the merits. If the question presented truly is as important as the County claims, it will recur in future cases; there is no need to grant review in a case plagued with jurisdictional issues. Accordingly, the petition should be denied.

STATEMENT

I. FACTUAL BACKGROUND

A. Clark County Expands Its Airport and Recognizes Its Duty To Pay for Airspace Over the Vacation Village Property

In 1988, respondent CEH Properties, Ltd. ("CEH"), a Nevada resort developer, acquired title to the Vacation Village property, a parcel of land near McCarran Airport in Las Vegas, Nevada. At the time, the only air traffic rules restricting the height of construction on the property were contained in Clark County Ordinance No. 728. That ordinance set height restrictions at one foot for every 20 feet from the end of the runway ("20/1"). Pet. App. 72a. The vast majority of the Vacation Village property was outside that 20/1 "approach zone." C.A. E.R. 282-283; C.A. S.E.R. 45, 47.

On May 2, 1989, Clark County considered a plan to change runway 1R at McCarran from a visual-approach runway to a precision-instrument-approach runway,

which would require lower height restrictions over property to the south of the airport, including Vacation Village. Clark County recognized that it would have to compensate landowners for that change:

> [A]irport staff is requesting authorization to obtain appraisals of the property that would be impacted by protection for a precision approach to runway 1R.
>
> Once the market value is established through the appraisal process, this information will be presented * * * for approval of the potential acquisitions.

C.A. S.E.R. 23.

Representatives of the airport met with CEH and the Heers family and assured them that the airport did not intend to condemn the Vacation Village property. C.A. S.E.R. 29. CEH then obtained necessary permits and began to complete construction of the first phase of its hotel and casino. Pet. App. 6a; C.A. E.R. 242; C.A. S.E.R. 18.

On October 25, 1989, airport representatives met to discuss whether to withdraw CEH's building permits to give them additional leverage when negotiating the price of the Vacation Village property. The discussion included the following:

> Heers has one remaining permit to pull but it is for remodeling of a second floor area and there would be no leverage by holding [the] permit. On 9/20/89, the building permit for the 2 story (new building) casino area was approved.
>
> Some alternative[s]: Condemn airspace, condemn land, revoke building permit (which would not be legal) or negotiate. All alternatives would result in [a] lawsuit.

C.A. S.E.R. 18. Clark County did not disclose those discussions to CEH; nor did Clark County reveal its intent to block CEH's full development of its hotel and casino. As a result, construction continued.

On January 16, 1990, the FAA determined that Clark County's new lower height restrictions conflicted with CEH's development plan, which included an 80-foot high sign, three 76-foot high hotel buildings and a 47-foot high casino. Pet. App. 6a. McCarran's director once again acknowledged the County's obligation to pay in a statement to the Clark County Commission:

> There are a combination of circumstances that have led us to think that probably the best solution * * * is for the County or for the Department of Aviation through the County to begin the process to acquire this piece of property. * * * It would have been better had we had the money at the time and be[en] able to do that certainly before they started construction, but we weren't in that position.

C.A. S.E.R. 25-26. The County Commission then approved the airport's request to appraise and acquire the property. *Id.* at 27. Nevertheless, the County did not provide an appraisal of the property for more than twelve years.

B. Clark County Adopts a New Zoning Ordinance To Avoid Paying for Airspace Over the Vacation Village Property

On August 1, 1990, Clark County adopted Ordinance No. 1221, setting new height restrictions of one foot for every *50 feet* from the end of the runway. Pet. App. 6a. As a result, the entire buildable space of the Vacation Village property became part of the airport approach zone. C.A. E.R. 282-283. Under the new ordinance, presumptive height limits on the Vacation Village property ranged from a mere 5 to 25 feet (although another code

provision effectively authorized construction up to 35 feet over most of the property). Pet. App. 42a; C.A. E.R. 282. All limits were less than half the height of CEH's original 80-foot-tall development plan. Pet. App. 6a. Still, the County did not pay any compensation.

Clark County refused to pay even though it received federal funding from the FAA and additional funding through FAA-approved Passenger Facility Charges ("PFCs") for expansion of the airport. C.A. S.E.R. 110, 161, 170-174. A condition of receipt of such funding was obtaining the right to clear the airspace needed for take-off and landing. See 49 U.S.C. § 47106(b)(1). Clark County provided written assurances to the FAA that it had complied with that requirement by appraisal and negotiation, avoiding the need for condemnation. C.A. S.E.R. 175, 182; see also 42 U.S.C. § 4651, made applicable in Nevada by Nev. Rev. Stat. § 342.105.

In 1991, Clark County obtained FAA permission to impose PFCs on airlines using the expanded runway system. C.A. S.E.R. 98, 100, 105-106, 110-113. Clark County established a $60 million budget line-item for acquiring property in connection with the expansion. *Id.* at 100, 104-106, 119-124. This unspent line-item related to only two properties, one of which was Vacation Village, *id.* at 104, 106, and Clark County admitted below that it had already acquired the other property, C.A. Reply Br. 8.[1]

II. PROCEEDINGS BELOW

A. Proceedings in the Trial Courts

In 1993, CEH and the other respondents brought an inverse condemnation claim in Nevada state court, which

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[1] Clark County claims to have spent more than $40 million (separate from the $60 million PFC line-item) acquiring land and other property interests to "protect the navigable airspace." Pet. 8-9. But nothing in the record supports that claim.

was removed to federal bankruptcy court after CEH filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Pet. App. 6a, 7a. At trial, CEH presented evidence of its plans for an 80-foot-tall hotel/casino and the 35-foot height limit that the County's ordinance imposed, *id.* at 39a, 42a, as well as testimony that, because of consumer preferences, tall buildings were particularly important for casino/hotel developments, C.A. S.E.R. at 79. CEH also introduced videotape evidence of frequent low flights through Vacation Village airspace and tracking data showing flights directly over the property. *Id.* at 49, 53-54. Evidence showed that 15% to 20% of large aircraft at McCarran, including Boeing 747's, Boeing 757's and McDonald Douglas MD-80's, land on the runways at issue. *Id.* at 55-57.

After the trial but before any decision, the presiding bankruptcy judge (the Hon. Robert C. Jones) was appointed to the district court. Pet. App. 8a-9a. Despite having taken the bench as a district judge, Judge Jones continued to hold proceedings and enter orders in the case while it was in bankruptcy court. *Id.* at 8a, 36a.

On December 30, 2004, Judge Jones issued dispositive findings of fact and conclusions of law. Pet. App. 36a. He determined that the lower approach path of Clark County's new plan "directly, substantially, and immediately interfered with the enjoyment and use of [CEH's] property," namely, its "intended use" as a "hotel and casino with the heights of various structures ranging from 28 feet to 80 feet." Pet. App. 54a. "[T]he decreased altitude in arriving and departing aircraft contributed to [a] decline in market value" of the property. *Id.* at 55a. After hearing appraisals, Judge Jones found that the value of CEH's property was reduced from $10 per square foot to $5.50 per square foot. *Id.* at 27a. On January 4, 2005, Judge Jones, acting as a district judge, *sua sponte* with-

drew the bankruptcy court reference, and eventually entered judgment. *Id.* at 9a, 26a, 31a.

B. Proceedings in the Court of Appeals

Clark County appealed to the Ninth Circuit, and CEH cross-appealed. While the appeal was pending, the Nevada Supreme Court decided *McCarran International Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006). That case raised a takings challenge to the same ordinance at issue here; it was brought by the owner of property south of Vacation Village that was also affected by the McCarran airport expansion. Many of the facts are identical. In *Sisolak*, the Nevada Supreme Court concluded that the airport's actions were a taking under both the Federal and Nevada Constitutions. *Id.* at 1124.

After receiving supplemental briefing on *Sisolak*, the Ninth Circuit affirmed in part and remanded in part. Pet. App. 1a-25a.[2] Before turning to the merits, the court of appeals rejected a series of challenges that Clark County had raised to the bankruptcy court's and district court's subject-matter jurisdiction.

1. *The Jurisdictional Rulings*

The court of appeals first considered Clark County's claim that the district court "lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine." Pet. App. 9a-10a. Clark County argued that the bankruptcy court had committed a "patent violation of the *Rooker-Feldman* doctrine" by revisiting prior state-court rulings on timeliness, urging that the bankruptcy court itself had "expressed concerns" about violating that doctrine. C.A. Br. 18-19. The court of appeals concluded, however, that

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[2] The court also issued an unpublished memorandum disposition addressing other issues not relevant here. *Vacation Village* v. *Clark County*, Nos. 05-16173+ (9th Cir. Jul. 23, 2007).

the state court's rulings were not sufficiently final to trigger *Rooker-Feldman*. Pet. App. 10a.

The court of appeals then turned to Clark County's challenge to subject-matter jurisdiction under the Bankruptcy Code. The County argued that the bankruptcy court lacked jurisdiction under 28 U.S.C. § 1334(b) because the case was not sufficiently "related to" any bankruptcy proceeding. Rejecting that argument, the court of appeals found that the lawsuit was part of the bankruptcy estate, and that its status as part of the estate was sufficient to confer jurisdiction. Pet. App. 12a.

Third, the court of appeals addressed the County's claim that the takings challenge was unripe because CEH had not properly pursued state remedies. Pet. App. 12a-14a. The court stated that "'[r]ipeness is more than a mere procedural question; it is determinative of jurisdiction.'" *Id.* at 12a. The court then reviewed the precedents on ripeness and whether the bankruptcy court's factual findings were supported by the record. *Id.* at 12a-14a. It concluded that CEH had adequately pursued state remedies. *Id.* at 13a.

Fourth, the court of appeals addressed the County's challenge to Judge Jones' entry of orders on behalf of the bankruptcy court while sitting as a district judge. Pet. App. 15a-16a. Clark County argued that Judge Jones had "exceeded his jurisdiction and violated the separation of powers doctrine by concurrently acting through Article I and Article III courts." C.A. Br. 25-26. The court of appeals acknowledged that the case had a "unique procedural history" but concluded that Judge Jones' actions were not grounds for reversal. Pet. App. 15a-16a.

Finally, the court of appeals addressed the County's claim that Judge Jones had exceeded his jurisdiction when he withdrew the bankruptcy reference and, sitting as a district judge, entered judgment in a case he had

presided over while a bankruptcy judge. Pet. App. 16a-17a. The County contended that this, too, was a "jurisdictional error[]," arguing that it circumvented Congress's design that district courts exercise appellate jurisdiction over bankruptcy court decisions. C.A. Br. 23-25. The court of appeals conceded that "there may have been some abrogation of the County's right to an intermediate appeal," but held that reversal was not required because Judge Jones had "efficiently used judicial resources and minimized further delay." Pet. App. 16a-17a.

2. *The Merits*

The court of appeals then turned to the merits. It first addressed whether the County's actions constituted a taking under the Federal Constitution. Disagreeing with the Nevada Supreme Court's conclusion in *Sisolak*, the court of appeals held that the ordinance did not amount to a federal taking. Pet. App. 18a.

The court of appeals then turned to whether there was a taking under the Nevada Constitution. The court noted that "'a state may place stricter standards on its exercise of the takings power through its state constitution.'" Pet. App. 18a (quoting *Kelo* v. *City of New London*, 545 U.S. 469, 489 (2003)). The court concluded that the Nevada Supreme Court in *Sisolak* had interpreted the state constitution to provide that "Nevadans have a property interest 'in the usable airspace above [their] property up to 500 feet.'" Pet. App. 18a-19a, 22a (quoting 137 P.3d at 1120). Applying that rule from *Sisolak*, the court of appeals concluded that the County's actions constituted a taking under the Nevada Constitution. *Id.* at 19a.

The court of appeals then addressed the issue on which Clark County seeks review. The court rejected the County's argument that federal aviation law preempted the Nevada Supreme Court's construction of the Nevada Constitution. Pet. App. 19a. The court relied on *Janko-*

vich v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), which involved a similar challenge to height limitations in an airport's approach zone. Pet. App. 20a. In *Jankovich*, as here, the petitioners had claimed that a state court's construction of its state constitutional takings provision was preempted by federal aviation law. *Ibid.* (quoting 379 U.S. at 492). This Court rejected that challenge, concluding that a decision holding the ordinance "invalid as a taking was 'compatible with the congressional policy.'" *Ibid.* (quoting 379 U.S. at 495). In the case below, the court of appeals held that, because "the Supreme Court ha[d] already spoken on a substantially similar issue" in *Jankovich* and "no subsequent Supreme Court authority * * * call[ed] the holding of *Jankovich* into question," federal law did not preempt the Nevada Constitution.

Finally, the court of appeals turned to whether the district court had erred in computing damages by limiting compensation on account of easements respondents had previously granted. Pet. App. 21a-23a. Again relying on *Sisolak*, the court held that the district court had misconstrued the significance of the easements under state law, and remanded for a recalculation of damages. *Ibid.*

ARGUMENT

While this case was pending in the court of appeals, Clark County and McCarran Airport filed a petition for a writ of certiorari raising precisely the issue raised in this petition. See *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (filed Nov. 8, 2006). That petition sought review of the Nevada Supreme Court's decision in *McCarran International Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), the state-law takings decision that the court of appeals followed here. The first question presented in the *Sisolak* petition is identical to the question presented here. Compare Pet. i with Pet. in No. 06-658,

at i.[3] Authored by the same counsel, on behalf of the same client, the petition there made the same arguments as the petition here. Compare Pet. 15-30 with Pet. in No. 06-658, at 11-22. And that petition was supported by the same group of *amici* that supports this one. *See* Br. of Air Line Pilots Ass'n *et al.* in No. 06-658 (filed Jan. 12, 2007). This Court denied that petition. Nothing warrants a different result here.

To the contrary, as in *Sisolak*, there is no split of authority. Pet. 26. Clark County's assertion of profound national importance is also no more persuasive now than it was then. The court of appeals did nothing more than uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution in a dispute between a Nevada airport and a Nevada landowner. As this Court recognized decades ago in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), that is not a pressing federal issue. Federal aviation law simply does not preclude States from requiring airports seeking to expand to pay just compensation for usable airspace above private property when they appropriate it for public transit.

The primary difference between this case and *Sisolak* is that, in *Sisolak*, the respondent *conceded* that the "federal preemption claim [wa]s not jurisdictionally barred." Br. in Opp. in No. 06-658, at 20. Here, by contrast, there are *five* separate jurisdictional issues the Court would

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[3] The petition in *Sisolak* also asked this Court to review the Nevada Supreme Court's conclusion that the McCarran airport expansion effected a taking under the Federal Constitution. Pet. in No. 06-658, at i, 22-29. As the brief in opposition in *Sisolak* explained, the Court lacked jurisdiction to consider that ruling because the determination that compensation was required also rested on an independent and adequate state ground—that there was a taking under the state constitution. Br. in Opp. in No. 06-658, at 10-15. The brief conceded, however, that the jurisdictional bar did *not* apply to the preemption question—the question again being presented here. *Id.* at 20.

have to address before reaching the merits (issues that Clark County pressed below but does not mention in the petition). If the preemption issue is as important as Clark County contends it is, it will undoubtedly recur in future cases. There is no need for this Court to grant review in a case plagued with vehicle problems.

I. CLARK COUNTY ADMITS THAT THE DECISION BELOW PRESENTS NO SQUARE CIRCUIT CONFLICT

"[T]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton* v. *Comm'r*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari). Here, Clark County *concedes* that the case "may not reflect [a] 'square' conflict in the circuits." Pet. 26. That is clearly correct: The Ninth Circuit and the Nevada Supreme Court both now agree that the County's preemption claim fails. The absence of any conflict by itself justifies denying review.

A. The Court of Appeals' Decision Is a Straightforward Application of *Jankovich*

The absence of any conflict is not surprising. As the court of appeals noted, this Court "has already spoken on a substantially similar issue" in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965). Pet. App. 20a. At issue in *Jankovich* was an airport zoning ordinance that imposed a height restriction to allow takeoff and landing of aircraft. *Id.* at 488. The Indiana Supreme Court ruled that the restriction violated both the Indiana and Federal Constitutions because it was an effort by a municipality "'to take and appropriate to its own use the ordinarily usable airspace of property adjacent to the Gary Airport.'" *Id.* at 489-490, 493 (quoting 193 N.E.2d 237, 241 (1963)). The *Jankovich* petitioners argued in this Court that the state supreme court's reliance on the state constitution was preempted by federal aviation law:

> The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme.

Pet. Br. 53-54, in *Jankovich, supra.*

The Solicitor General, in turn, filed an *amicus* brief in *Jankovich* that took direct issue with that argument, stating that federal aviation law did not preclude States from recognizing property rights in the usable airspace immediately above privately owned land. See U.S. Br. as *Amicus Curiae* 2 n.1, in *Jankovich, supra.* The Solicitor General advised the Court that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." *Ibid.*

In dismissing the writ as improvidently granted, this Court adopted verbatim the Solicitor General's position that "'there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.'" 379 U.S. at 494 (quoting U.S. Br. 2 n.1). Describing the preemption claim as "insubstantial," the Court held "that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-495 & n.2.[4]

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[4] This Court's ruling accords entirely with its earlier decision in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the Court rejected the extreme notion that the meaning of the federal statutory definition of navigable airspace is that landowners cannot have private property rights in airspace below 500 feet if airplanes need

Nothing has happened since *Jankovich* that suggests a different result now. The relevant federal statutory language and FAA regulations are no different today than they were then. Compare 49 U.S.C. § 40102(a)(32) (2006) and 14 C.F.R. § 91.119 (2006) with 72 Stat. 739, 49 U.S.C. § 1301(24) (quoted in *Griggs* v. *Allegheny County*, 369 U.S. 84, 88 (1962)) and 14 C.F.R. § 60.17 (1965) (quoted in *Griggs*, 369 U.S. at 88 n.1). As *Jankovich* makes clear, federal law in no manner limits the authority of States to recognize property rights in the usable airspace immediately above privately owned land and to protect those rights through their state constitutions.

B. The Circuit Cases on Which Clark County Relies Are Inapposite

Despite disclaiming any square circuit conflict (Pet. 26), Clark County cites a handful of cases allegedly "at odds" with the court of appeals' approach. Pet. 27-29. Several were also cited in the *Sisolak* petition. See Pet. in No. 06-658, at 21. They did not justify review in *Sisolak*, and they no more justify review here.

In the first case, *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005), the Federal Circuit rejected a takings claim under the *Federal* Consti-

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that space for takeoff and landing: "But as we said in the *Causby* case, the use of land presupposes the use of some airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected * * *." *Id.* at 88-89. Acknowledging that "[w]ithout the 'approach areas,' an airport is indeed not operable," the Court reasoned that an airport operator must "acquire some private property," and that the airport in *Griggs* "by constitutional standards * * * did not acquire enough." *Id.* at 90. The Court specifically considered the Federal Aviation Act's definition of "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft"—the same definition Clark County relies on here (Pet. 6, 16)—but held that the airport nevertheless had a duty to pay just compensation. See *Griggs*, 369 U.S. at 88-90.

tution after the FAA prohibited commercial helicopter flights in an area of Washington, D.C., that included the plaintiff's heliport. That case had nothing to do with whether federal law would preempt a *State's* recognition, under its *own* constitution, of a right to just compensation for the taking of airspace usable for private development. Nor did the case have anything to do with usable airspace immediately above private land. The plaintiff claimed "not merely a right to access the airspace over its heliport, but a right to access the *navigable airspace from* its heliport"—airspace already in the public domain. *Id.* at 1217 (emphasis added). As a result, the court stated that it would "*not* consider the extent to which Air Pegasus * * * has the right to use non-navigable airspace immediately above its leasehold." *Ibid.* (emphasis added). The case thus did not involve an airport's attempt to appropriate usable airspace immediately above privately owned land for public transit. It involved a challenge to regulations limiting the public's use of what was *already* navigable airspace.

City of Austin v. *Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234 (Tex. 2002), is inapt for similar reasons. That case involved a takings claim under the Federal and Texas Constitutions, which the state court construed to be coextensive. *Id.* at 238-239. Because the court found no taking under either clause, no preemption issue arose.

In *United States* v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974), the Second Circuit considered a state court *injunction* that *prohibited* a New Haven airport from using airspace over East Haven for takeoff or landing. The case did not involve a takings claim and did not address whether the airport would have to pay just compensation for using East Haven's airspace. To the contrary, the court made clear that it was *only* addressing the *injunction*: "This decision does not in any way preclude East Haven from seeking other remedies that

do not conflict with the Supremacy Clause.'" *Id.* at 454 n.3. In the instant case, CEH merely seeks just compensation for the taking of its private airspace by Clark County's airport expansion; it does not seek to *enjoin* the use of airspace. Although the County claims that requiring it to pay just compensation for airspace "effectively bar[s] such access," Pet. 28, the court in *New Haven* clearly distinguished injunctions from other remedies, 496 F.2d at 454 n.3.

Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001), is even less relevant. Like *New Haven*, that case addressed an attempt to *enjoin* use of airspace; and like *New Haven*, the court expressly left open the possibility of monetary relief, stating that the claimant was also "free * * * to pursue a takings claim." *Id.* at 405. The Seventh Circuit, moreover, did *not* find *any* conflict with federal aviation law. Contrary to the petition's erroneous assertion (Pet. 28), the Seventh Circuit stated that it would "make no ruling" on whether the plaintiff's claim would be "preempted by the Federal Aviation Act" under conflict preemption principles. *Ibid.*

The cases on which *Vorhees* relied make even more clear that no conflict exists. *Vorhees* cited *Bieneman* v. *City of Chicago*, 864 F.2d 463, 473 (7th Cir. 1988), for the point that "'the state may employ damages remedies * * * to regulate aspects of airport operation over which the state has discretionary authority.'" 272 F.3d at 404. *Bieneman*, in turn, cited "buil[ding] more runways * * * (to the detriment of those under the new ones)" as an example of discretionary state authority. 864 F.2d at 473. And *Bieneman* specifically rejected the argument that damages remedies are necessarily preempted whenever federal aviation law prohibits a State from directly regulating airspace. See *id.* at 472 (citing *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)).

Other cases draw that same distinction. In *Krueger* v. *Mitchell*, 332 N.W.2d 733 (Wis. 1983), the court held that the Federal Aviation Act preempted state-law suits for injunctive relief, but not for damages:

> [I]njunctive relief is completely preempted in aviation noise nuisance actions because of the disruptive impact such a remedy would have on air commerce. However, nuisance actions claiming damages only are not preempted by the Act.

Id. at 740; see also *Fiese* v. *Sitorius*, 526 N.W.2d 86, 89-90 (Neb. 1995) (federal law preempts state overflight injunctions, even though landowners may be entitled to just compensation). In short, the federal aviation preemption case law clearly distinguishes between injunctions and damages. For that reason, the *injunction* cases Clark County cites have no bearing on the *damages* issue here. Because there is no conflict, this Court should deny the petition.

C. Clark County's Attempts to Distinguish *Jankovich* Do Not Warrant This Court's Review

Clark County attempts to distinguish *Jankovich*. But its purported distinctions are hardly a compelling basis for this Court's review. Petitioner cites *no* case that has ever accepted the distinctions it now offers.

The purported distinctions lack merit. The County first argues that *Jankovich* is distinguishable because it involved a "traditional takings claim—*i.e.*, that a zoning restriction deprived [the plaintiff] of the *use of its land*." Pet. 24 (emphasis added). Not so: The Indiana Supreme Court held that a "taking requiring compensation—rather than mere regulation—was effected * * * because 'the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the *ordinarily usable air space* of property adjacent to the Gary Airport.'" 379 U.S. at 493 (quoting

193 N.E.2d at 241) (emphasis added). That is exactly what the Nevada Supreme Court held in *Sisolak*: "Nevadans have a property interest 'in the *usable airspace* above [their] property * * * .'" Pet. App. 22a (quoting 137 P.3d at 1120) (emphasis added).

Any differences would have no bearing on the question presented. The Indiana Supreme Court found a taking under state law, and this Court held that federal aviation law did not preclude that result regardless of whether there was also a taking under the Federal Constitution. 379 U.S. at 489-495. That holding cannot be squared with Clark County's theory that federal aviation law grants airports the right to use whatever airspace they need for takeoff or landing, so long as they do not effect a *federal* taking. That is true regardless of any differences between the takings claim in *Jankovich* and the takings claim here.

Clark County also attempts to distinguish *Jankovich* on the ground that the petitioners there relied on the Federal Airports Act rather than the Federal Aviation Act. Pet. 25. But no court has ever suggested that the result in *Jankovich* can be avoided merely by citing a different provision of federal aviation law. This Court held broadly in *Jankovich* that "'there is no basis for a contention that *federal law* removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.'" 379 U.S. at 494 (emphasis added). The Court also discussed regulations governing the "'acquisition and retention of easements or other interests in or rights for the use of land *or airspace*'" and authorized expenditure of funds for that purpose. *Id.* at 494 (emphasis added). It strains credulity to suggest this Court simply overlooked the supposedly preemptive effect of the statutory definition of "navigable airspace" in reaching that conclusion.

D. Federal Statutes and Regulations Recognize Airports' Duty To Pay Just Compensation Under Federal or Local Law

The absence of any circuit conflict is also unsurprising given that federal law has long recognized that airports have a duty to pay for airspace they appropriate, whether compensation is mandated by federal *or local* law. For instance, the Airport and Airway Improvement Act of 1982 makes removal of hazards to takeoff and landing a condition of federal funds, but provides that funds may be expended for "the acquisition of land or interests therein or easements through or other interests *in airspace*." Pub. L. No. 97-248, §§ 511(a)(4), (a)(5), 513(a)(2), 96 Stat. 324, 671, 687-688, 689 (1982) (emphasis added). Section 10(d) of the Federal Airport Act likewise provides federal funding for the "cost of acquiring land or interest therein or easements through or other interests *in air space*." Ch. 251, 60 Stat. 170, 176 (1946) (emphasis added).

Title 49 of the United States Code includes many other examples. Section 40110(a) provides that the FAA may "acquire * * *, by condemnation or otherwise, an interest in property, *including an interest in airspace* immediately adjacent to and needed for airports and other air navigation facilities owned by the United States Government." (Emphasis added.) Section 47102(3) defines "airport development" to include "[a]cquiring an interest in land *or airspace*." (Emphasis added.) And Section 47125(a) requires the Secretary of Transportation to request other federal agencies "owning or controlling land *or airspace* to convey a property interest in the land *or airspace*" for airport development. (Emphasis added.) These statutes all clearly recognize property rights in airspace and make clear that airports must often pay to acquire those rights.

FAA regulations are to the same effect. A firm condition of federal aid for airport improvements is that "the sponsor must own, acquire, or agree to acquire an adequate property interest in runway clear zones." 14 C.F.R. § 151.11(a)-(d). "[A]n airport operator or owner is considered to have an adequate property interest if it has an easement * * * giving it enough control to rid the clear zone of all obstructions * * * and to prevent the construction of future obstructions." 14 C.F.R. § 151.9(c). While the regulations also recognize the possibility of enacting land use regulations to prevent aviation hazards, the agency expressly acknowledges that such regulations may not be an adequate substitute for acquiring easements because height limitations could be considered "unreasonable in view of current and future foreseeable use of the property" and therefore not "a reasonable exercise of the police power." 14 C.F.R. § 151.11(f). Far from evincing a belief that federal law preempts state property rights in airspace, the FAA treats the question as exclusively one of state law: It requires assurances from the airport operator or owner in the form of a "legal opinion" on the reasonableness of the restrictions. *Ibid.*

Any conceivable doubt is eliminated by official FAA guidance, *Advisory Circular No. 150/5190-4A: A Model Zoning Ordinance to Limit Heights of Objects Around Airports* (Dec. 14, 1987), *available at* www.faa.gov, which clarifies that federal law does *not* preempt state property law in this respect: "Any height limitations imposed by a zoning ordinance must be 'reasonable,' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation *under local law.*" *Id.* at 3 ¶ 5d (emphasis added). Other FAA guidance is in accord. See, *e.g.*, *FAA Discussion Paper on Zoning for Airports* (Sept. 8, 1987), *quoted in* Br. in Opp. in No. 06-658, at 24 n.12 ("As zoning law is individual to each state the state statutes must be

referred to, to determine the extent of zoning authority."); *Advisory Circular No. 150/5100-17: Land Acquisition and Relocation Assistance for Airport Improvement Assisted Projects* § 2-15(c) (Nov. 7, 2005), *available at* www.faa.gov ("Avigation easements are typically acquired for airspace requirements * * * including the approach area * * * ."); FAA, *Land Use Compatibility and Airports*, at I-2 (2005), *available at* www.faa.gov ("While the FAA can provide assistance and funding to encourage compatible land development around airports, it has no regulatory authority for controlling land uses to protect airport capacity."). These authorities are incompatible with the County's interpretation: If States were forbidden from protecting property rights in airspace that would be needed for takeoff or landing under an expansion plan, there would never be any need to consult "local law" to determine whether a taking had occurred.

While the County urges that the Federal Aviation Act defines "navigable airspace" to include airspace "needed to ensure safety in the takeoff and landing of aircraft," 49 U.S.C. § 40102(a)(32), that definition does not address the antecedent question of whether an airport must pay compensation if its expansion plan would *transform* airspace that was *not* "needed to ensure safety in the takeoff and landing of aircraft" into airspace that *is*—effectively converting buildable airspace over private land into airspace open to the public. The statutes and regulations clearly envision that, *before* expansion occurs, the airport must acquire the necessary airspace, paying just compensation when necessary under federal or local law. Only *after* that process has occurred may the airport expand its operations, thereby rendering that airspace "needed to ensure safety in the takeoff and landing of aircraft" and making it part of the navigable airspace. Clark County's contrary interpretation—unsupported by any case, statute, or regulation—ignores the structure of

the statute, yields wholly unreasonable results, and does not remotely present any basis for this Court's review.

II. CLARK COUNTY EXAGGERATES THE IMPORTANCE OF THE DECISION BELOW

Unable to muster a circuit conflict, Clark County urges that the preemption question "will have profound consequences for the continued safe and efficient operation of the nation's air transportation system." Pet. 2. But that grandiose hyperbole overstates the importance of the court of appeals' ruling.

As an initial matter, the court of appeals did nothing more than uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution in a dispute between a Nevada municipal airport and a Nevada landowner. That interpretation has *no* impact on airports in other jurisdictions. Far from being a matter of national significance, this case is fundamentally about Nevada and the extent to which it requires its municipalities to compensate its citizens for property rights taken for airport expansion.

Clark County also exaggerates the scope of the Nevada Supreme Court's rule. That rule does not amount to "protection of an unqualified interest in navigable airspace"; nor does it mean that "any state can nullify the public's federal law right to travel through navigable airspace." Pet. 2, 15. It merely imposes a *precondition* to airport expansions that would make otherwise private airspace into public navigable airspace in the first place.

Even under the Federal Constitution, airports must often pay just compensation when they seek to expand. See, *e.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *United States* v. *Causby*, 328 U.S. 256 (1946). As shown above, pp. 19-21, *supra*, payment for airspace is a central feature of the federal regime. For those reasons, the

Nevada Supreme Court's ruling does not force Nevada airports to do anything other airports do not already do.

Clark County also overstates the decision's financial significance. Although it insists the decision threatens it with $10 *billion* of liability (Pet. 19), that figure has no support anywhere in the record. The judgment in this case was for only $10 million (before the remand). Pet. App. 9a. If that judgment threatened the County with liability exceeding $10 billion, the County surely would have said so previously. But it did not. Besides, as noted above, p. 5, *supra*, Clark County established a $60 million budget line-item for acquiring property including Vacation Village. C.A. S.E.R. 100, 104-106, 119-124. No harm will result to the national air transportation system if Clark County pays funds it obtained with FAA approval to compensate CEH for the full losses CEH suffered.

More than forty years ago, the petitioners in *Jankovich* offered the same doomsday scenario in the aftermath of the Indiana Supreme Court's decision there. They warned that "the inevitable consequence" of the decision would be "financially prohibitive" liability that would "price[] airports out of existence in Indiana" and "cripple[]" the national transportation system. See Pet. Br. 54-55, in *Jankovich*, *supra*. That prophecy, however, was not realized. The Nation's air transportation system and the State of Indiana are doing well. There is no plausible basis for supposing that Clark County's exaggerated rhetoric has any more credibility today than the *Jankovich* petitioners' did in 1965.

III. THIS CASE IS A POOR VEHICLE TO REACH THE QUESTION PRESENTED

Even if the question presented were of national importance—and it is not—this case would plainly be an inadequate vehicle to address it. There are multiple jurisdictional issues that this Court would have to traverse

before reaching the question on which petitioner seeks review. That alone justifies denying review. If the question presented truly is the $10 billion issue Clark County contends it is, it will arise again in other cases that are not plagued by the obvious vehicle problems that would impede this Court's review here.

A. Multiple Threshold Jurisdictional Issues Make This Case an Inadequate Vehicle

Although nowhere mentioned by the petition, the court of appeals' opinion begins by addressing *five* separate jurisdictional issues. Pet. App. 9a-17a. This Court would likewise have to address those five issues before it could reach the question presented. As Clark County observed below, "Article III * * * requires that every federal court 'satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case.'" C.A. Br. 14 (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). The County characterized each of those five threshold issues as "jurisdictional" below, *id.* at 14-26, and the court of appeals agreed, describing them as "challenges to the existence and exercise of jurisdiction in this case," Pet. App. 9a. Those jurisdictional issues make this case a much worse vehicle than *Sisolak*, where this Court denied review even though everyone *agreed* that the "federal preemption claim [wa]s not jurisdictionally barred." Br. in Opp. in *Sisolak*, No. 06-658, at 20; see also p. 11, n.3, *supra*.

Clark County does not, and cannot, claim that any of those issues is independently worthy of review. And surely the County, which pressed each of the five jurisdictional challenges below, cannot now claim they are so insubstantial that they present no meaningful barrier to review. The need to wade through nearly a half-dozen jurisdictional issues before reaching the merits weighs dispositively against certiorari.

1. *Ripeness*

Clark County first argued below that federal jurisdiction was lacking because CEH's takings claim was unripe. Generally, a takings claim is unripe until the relevant governmental entity has reached a final decision regarding the property at issue, and the landowner has sought compensation through the procedures the state has provided. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186, 194 (1985). The County argued below that CEH had failed to exhaust state procedures, citing *Cowell* v. *Palmer Township*, 263 F.3d 286, 291 (3d Cir. 2001), for the proposition that adjudication of takings claims "in federal bankruptcy court is not an appropriate alternative to the state inverse condemnation procedures." C.A. Br. 16.

The court of appeals relied on circuit precedent holding that, where a takings claim involves a physical invasion of property, the finality element is "'automatically satisfied at the time of the physical taking.'" Pet. App. 12a. The court further held that, regardless of whether the taking was a physical invasion under federal law, the Nevada Supreme Court's characterization governed the state takings claim. *Ibid.* As to exhaustion, the court of appeals examined Nevada case law and determined that an inverse condemnation lawsuit was an appropriate remedy. *Id.* at 14a. The court further held that litigation of the claim in bankruptcy court did not change that result because the claim was there only by virtue of removal. *Ibid.* Respondents agree with that analysis. But the necessity of revisiting each step of that ripeness analysis—some of which are specific to Nevada law—before this Court could even reach the question presented weighs strongly against granting the petition.

2. *Rooker-Feldman*

Clark County also invoked the *Rooker-Feldman* doctrine, another limitation on subject-matter jurisdiction that a federal court is obligated to address. See *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). *Rooker-Feldman* bars district courts from reviewing prior state-court decisions. *Id.* at 284. In the court of appeals, Clark County claimed that, by the time CEH had filed its notice of removal, the state court had already ruled that it would dismiss for failure to bring claims to trial within the five-year period prescribed by Nevada law. C.A. Br. 19 (citing Nev. R. Civ. P. 41(e)). The County argued that, "although the bankruptcy court agreed with the state court that the automatic bankruptcy stay did not apply to the Landowners' claims" and "expressed concerns about violating the *Rooker-Feldman* doctrine," it "entered an order lifting the nonexistent stay so [CEH] could proceed with removal and escape dismissal." C.A. Br. 19. According to the County, this "collateral attack on the state court's ruling was a patent violation of *Rooker-Feldman*." *Ibid.*

The court of appeals read the record differently. It understood the state court to have indicated only that it "*would* dismiss the case *if and when* the statute of limitations * * * expired." Pet. App. 10a. Because that ruling was not sufficiently final, *Rooker-Feldman* did not apply. *Ibid.* The prospect of having to review that record-specific analysis also clearly weighs against review.

3. *Bankruptcy Jurisdiction*

Under 28 U.S.C. § 1334(b), bankruptcy courts have jurisdiction over "civil proceedings arising under title 11, or arising in or relating to cases under title 11." The Ninth Circuit has held that a closer nexus must exist to establish jurisdiction under the "relating to" prong where a reorganization plan has already been confirmed. See

In re Pegasus Gold Corp., 394 F.3d 1189, 1193 (9th Cir. 2005). Under that rule, it is not sufficient that the case "could conceivably increase the recovery to the creditors"; the action must "affect the implementation and execution of the Plan itself." *Id.* at 1194 n.1.

In this case, Clark County argued that jurisdiction was lacking because the inverse condemnation claim at issue here had no effect on the implementation or execution of the confirmed Chapter 11 plan. C.A. Br. 20-22. The court of appeals rejected that argument because the inverse condemnation claim was property of the bankruptcy estate. Pet. App. 11a. According to the court of appeals, claims that are property of the estate are "related to" the bankruptcy under 28 U.S.C. § 1334(b) "without further scrutiny." *Ibid.* (citing *Celotex Corp.* v. *Edwards*, 514 U.S. 300 (1995)). Whether the Ninth Circuit properly articulated the scope of bankruptcy jurisdiction is similarly a threshold issue that plainly does not warrant this Court's attention but that this Court would nevertheless have to address before reaching the question presented.

4. *Withdrawal of the Reference*

Judge Jones tried the case as a bankruptcy judge but was then elevated to the district court, where he withdrew the reference and entered judgment as a district judge. The County's fourth jurisdictional challenge questioned Judge Jones' authority to withdraw the reference in that manner. Pet. App. 16a-17a. Although district courts have authority to withdraw a bankruptcy court reference, withdrawal at a late stage in proceedings raises distinct issues. District courts have appellate jurisdiction over bankruptcy court decisions. 28 U.S.C. § 158. Some courts have indicated that belated withdrawal may effectively "derail[] the appellate process provided by statute." *In re Pruitt*, 910 F.2d 1160, 1167-

1168 (3d Cir. 1990). This case presents the additional unique circumstance that the district judge who withdrew the reference was also the bankruptcy judge who presided over the trial. The County argued below that the withdrawal prevented it from appealing two specific interlocutory rulings—the "unauthorized lifting of a non-existent stay" and the "denial of its motion to remand." C.A. Br. 24-25.

After examining a number of relevant factors, the court of appeals held that Judge Jones' withdrawal of the reference did not require reversal because he had "efficiently used judicial resources and minimized further delay." Pet. App. 16a-17a. That ruling presents a host of subsidiary issues that this Court would have to address before reaching the question presented—most of which have no significance beyond the unique procedural history of this case.[5] That too counsels against review.

5. *Separation of Powers*

The final jurisdictional issue relates to Judge Jones' continued entry of orders for the bankruptcy court—including the dispositive findings of fact and conclusions of law—after his elevation to the district court. Pet. App. 15a-16a. Below, the County argued that Judge Jones had "exceeded his jurisdiction and violated the separation of powers doctrine by concurrently acting through Article I and Article III courts." C.A. Br. 25-26.

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[5] Those issues include: (1) whether 28 U.S.C. § 158 or any other law limits withdrawal of a bankruptcy court reference and, if so, when; (2) whether withdrawal of the reference in this case abrogated Clark County's right to appeal any interlocutory ruling and, if so, whether that requires reversal; (3) whether the efficiency considerations cited by the court of appeals are a sufficient basis to support the withdrawal; and (4) whether the fact that the district judge who withdrew the reference was also the bankruptcy judge who presided over the trial affects the analysis.

The court of appeals rejected that argument because the County had cited "no authority for the proposition that Judge Jones's entering of findings of fact signed as a bankruptcy judge following his confirmation as an Article III judge constituted reversible error." Pet. App. 16a. It acknowledged that *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 457 U.S. 50 (1982), precluded bankruptcy judges from exercising Article III powers. Pet. App. 16a. According to the court of appeals, however, that case was inapposite because it involved the "opposite problem"—Article I judges exercising Article III powers rather than vice versa. Whatever the merits of that holding, this Court would have to address it too in order to assure itself that it had jurisdiction to reach the question presented.[6]

B. The Federal Takings Claim Presents an Alternative Ground for Affirmance

Finally, this case is an unsuitable vehicle because the County's actions also effected a taking under the Federal Constitution. That federal taking presents an alternative ground for affirmance that renders the preemption question irrelevant.

Clark County concedes that, under *United States* v. *Causby*, 328 U.S. 256 (1946), a federal taking can occur if overflights are "'so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.'" Pet. 16 (quoting 328 U.S. at 265-266). That is precisely what the bankruptcy court found here. The court cited *Causby* for the proposition that overflights "must pose a direct, substantial, and immediate interference with the enjoyment and use of the land," other-

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[6] Further, although the County and the court of appeals characterized all five issues as jurisdictional, see C.A. Br. 16-25; Pet. App. 9a, that characterization is not entirely clear for every issue. This Court would have to confront that preliminary question as well.

wise "there can be no taking." Pet. App. 52a. Applying that federal standard, the court made a factual finding that "Vacation Village has shown that the increased frequency of flights of large general aviation aircraft over its property, below the 20:1 avigation easement, directly, substantially, and immediately interfered with the enjoyment and use of its property." *Id.* at 54a. The overflights reduced the market value of CEH's land from $10 per square foot to $5.50 per square foot, which was the basis for the $10 million award. *Id.* at 27a.[7] Those findings are sufficient to establish a federal taking under *Causby*.

The court of appeals rejected the federal takings claim in a single paragraph, Pet. App. 18a, but it did not cite *Causby*, nor did it claim that the bankruptcy court's factual findings were clearly erroneous. A "[r]espondent may * * * defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). Here, the bankruptcy court made factual findings that, even on petitioner's account, establish a federal taking under *Causby*.

The preemption question on which Clark County seeks review is only properly presented in a case where there is a state-law taking but no federal taking. Flying large planes at low altitude over commercial property in a way that substantially reduces the market value of the land is a taking under either the federal or state constitution. That, too, makes this a wholly unsuitable vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Although the Ninth Circuit remanded for a recalculation of damages, Pet. App. 21a-23a, a hypothetical future damages award cannot be a proper basis for granting review.

Respectfully submitted.

Paul C. Ray, Esq.
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Blvd. South
Las Vegas, NV 89101
(702) 382-4044

Counsel for Respondents

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